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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BACCARAT FREMONT, LLC,

Plaintiff and Appellant,

v.

ALAMEDA COUNTY FLOOD
CONTROL AND WATER
CONSERVATION DISTRICT et al.,

Defendants and Respondents.

A123011

(Alameda County
Super. Ct. No. RG05195872)

Many years ago, respondents Alameda County Flood Control and Water Conservation District (ACFCD) and Union Sanitary District constructed public improvements on the subject property in Fremont. This construction activity altered drainage patterns, thereby creating wetland on a portion of the property. Shortly after appellant Baccarat Fremont, LLC (Baccarat) purchased the property for development in 1997, the United States Army Corps of Engineers (Corps) asserted jurisdiction over the wetlands.

In March 2005, Baccarat sued respondents in inverse condemnation, claiming that the Corps' "final decision," in which it "reaffirmed" an earlier jurisdictional determination, prevented the company from developing a large portion of the project and required substantial expenditures to implement mitigation measures. Baccarat amended the complaint in December 2007, to add a negligence claim seeking recovery of attorney

fees it expended in litigation against the Corps challenging the Corps' assertion of jurisdiction over the wetlands. The trial court concluded, among other points, that both causes of action were time barred and sustained respondents' demurrers without leave to amend. We agree and affirm.

I. BACKGROUND

A. Facts This Court May Consider

Upon review of a judgment of dismissal following the granting of a demurrer without leave to amend, an appellate court generally assumes the truth of properly pleaded factual allegations and all facts reasonably implied or inferred from those expressly alleged. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We also consider judicially noticed matters. (*Ibid.*) Judicially noticeable matters include the earlier pleadings and positions of a party "as well as established facts from both the same case and other cases." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877.)

Applying these principles, we consider the relevant factual allegations from the first amended complaint in this case, as well as Baccarat's complaint in its prior action against the Corps and others,¹ which involved the same wetlands at issue here, and the Ninth Circuit's decision affirming the judgment against Baccarat in that proceeding.² Both of these items are referenced in the first amended complaint.

B. Factual Allegations

In 1997, Baccarat purchased a 30.98-acre parcel in Fremont for the purpose of developing a commercial campus of office, research and development, and light manufacturing facilities. The property is located west of Interstate 880 and is bounded on the south and west by flood control channels constructed in the mid-1950's through the

¹ *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers*, Alameda County Superior Court No. 2002-055887, filed June 26, 2002, and later removed to federal court. At the request of ACFCD, the trial court took judicial notice of this complaint.

² *Baccarat Fremont v. U.S. Army Corps* (9th Cir. 2005) 425 F.3d 1150.

early 1960's by ACFCD. The sides of the channels are composed of levees located on ACFCD property that channelize upgradient flood flows into the San Francisco Bay.

Since constructing the channels, ACFCD has stored matter dredged from the channels on its property along the western border of the site. The dredged matter formed a berm which blocks the "historic sheet flow" off the site, thereby causing flooding and ponding on portions of the property.

Also in the late 1950's and early 1960's, respondent Union Sanitary District installed sewer facilities on the property, and in the process created depressions that contributed to the ponding and flooding.

Prior to the construction, maintenance and operation of the flood control channels and sewer facilities, the site was historically dry land, lying outside the historic tidal marshlands of the bay, and was not subject to ponding or flooding. In August 1997, Baccarat conducted a "jurisdictional wetland delineation" of the site. The Corps verified the delineation in January 1998, determining that 7.66 acres of wetlands—approximately six individual sites—came within its jurisdiction under the Clean Water Act (CWA).³ Respondents' activities resulting in flooding and ponding on the site caused the wetlands to be located there.

Baccarat did not contest the jurisdictional determination of the Corps. Instead, pursuant to that determination, in February 1998 Baccarat submitted an individual permit application to the Corps, seeking approval to place fill material on approximately 2.36 acres of the wetlands on the project site. The next month Baccarat submitted a grading plan to the City of Fremont; the city approved a revised grading plan for the project in July 2000, subject to certain conditions, including obtaining necessary approvals and permits from the Corps.

³ 33 United States Code section 1251 et seq.

In January 2001, three years following the Corps' jurisdictional determination, Baccarat asked the Corps to reconsider this determination in light of the United States Supreme Court decision in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers* (2001) 531 U.S. 159 (*Solid Waste Agency*) which, according to Baccarat, restricted the Corps' jurisdiction over isolated wetlands under the CWA. That May, the Corps' San Francisco District (District) denied the request and reasserted jurisdiction over the wetlands upon concluding that the wetlands were adjacent to tidal waters. Baccarat alleged in the complaint against the Corps that the May 2001 decision "effectively prevent[ed] [the company] from developing a large portion of the Project site."

Following Baccarat's administrative appeal of the District's jurisdictional determination and a remand to the District based on the reviewing body's finding that the jurisdictional determination was not supported by substantial evidence, in January 2002 the District *again* reaffirmed its jurisdictional determination. This decision constituted the Corps' final decision pursuant to 33 Code of Federal Regulations part 331.10 (2002 Final Decision).⁴ Like the assertion in the complaint against the Corps concerning the District's May 2001 decision, Baccarat asserted in the first amended complaint that the 2002 Final Decision prevented development of a large portion of the site.

The Corps' complaint also included the allegation that in February 2002, the Corps proffered a permit to fill 2.36 acres of wetlands on the condition that Baccarat create 2.36 acres of seasonal freshwater wetlands on the site, and enhance the remaining 5.3 acres of existing brackish wetlands. Baccarat executed the permit, reserving its rights to seek judicial review of the jurisdictional determination and associated terms and conditions.

⁴ The regulations define what is a final Corps' decision for purposes of exhausting administrative remedies such that the affected party may then file a legal action in federal court. (33 C.F.R. §§ 331.10, 331.12 (2008).)

Thereafter, in June 2002 Baccarat sued the Corps and others, seeking declaratory and injunctive relief from the jurisdictional determination. Ultimately, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the Corps, concluding there was no disputed material fact as to whether the wetlands came under the Corps' jurisdiction based on their adjacency to United States waters. (*Baccarat Fremont v. U.S. Army Corps*, *supra*, 425 F.3d at p. 1158.)

In prosecuting its suit against the Corps, Baccarat incurred attorney fees and costs.

C. Procedural History

The first amended complaint alleges causes of action for inverse condemnation and negligence. Baccarat's theory for inverse condemnation is this: But for respondents' actions in constructing and maintaining the flood control and sewer projects, ponding and flooding would not have occurred, wetlands would not have been created subject to the Corps' assertion of jurisdiction, and Baccarat would not have been prevented from developing a portion of the commercial project. Baccarat asserted negligence liability on the "tort of another" doctrine, namely that respondents' negligent actions in constructing the public works resulted in the wetlands, a situation which in turn "required" the company to challenge the Corps' jurisdiction and incur fees and costs in the process.

Both public entities demurred, on statute of limitations and other grounds. The trial court ruled that both claims were time-barred and the negligence claim did not and could not allege a statutory basis for liability. This appeal followed.

II. DISCUSSION

A. Inverse Condemnation

1. General Principles

Article I, section 19, subdivision (a) of the California Constitution requires a public entity to pay a property owner just compensation for any actual physical injury to the owner's real property that is proximately caused by a public improvement designed and constructed by such entity. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250,

263-264.) To sustain a cause of action for inverse condemnation, the property owner must plead and prove ownership of the property that was damaged or taken; that defendant public entity designed and constructed a public improvement on the property; and such activity proximately caused the damage or taking. (See *California State Automobile Assn. v. City of Palo Alto* (2006) 138 Cal.App.4th 474, 479-480.)

Inverse condemnation liability based on damage to private property arises when the public entity causes physical damage to the property or physically invades the property in any tangible manner. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 940.) “ ‘Any definite physical injury to land or an invasion of it cognizable to the senses, depreciating its market value, is a damage in the constitutional sense’ [Citation.]” (*Albers v. County of Los Angeles, supra*, 62 Cal.2d at p. 260.) Thus, where the inverse condemnation action seeks compensation for physical damage to property, the cause accrues “when the damage is sufficiently appreciable to a reasonable [person].” (*Mehl v. People ex rel. Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 717; accord, *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 286.) In other words, the statute of limitations runs from the time noticeable damage occurs, and reasonable notice is equated to knowledge. (*Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 254-255.) The applicable statute of limitations is the three-year period set forth in Code of Civil Procedure section 338, subdivision (j). (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 855 (*Lee*).) Finally, the appropriate measure of the owner’s recovery when property that has been damaged by a public entity is the diminution in market value of the property. (*Pierpont Inn, Inc. v. State of California* (1969) 70 Cal.2d 282, 295, overruled on another ground in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 698-699; *Albers v. County of Los Angeles, supra*, 62 Cal.2d at p. 260.)

2. *The Inverse Condemnation Cause Accrued in 1998*

Baccarat insists that its damages were not appreciable to a reasonable person until the Corps issued its 2002 Final Decision, and that the question of accrual is not appropriate for resolution on demurrer. We disagree.

First, where, as here, the allegations bearing on the issue of when damages were sufficiently appreciable are susceptible to only one inference, the question of accrual is one of law. As we explain, the facts alleged are not sufficient to support a reasonable inference that damages only became appreciable with the 2002 Final Decision, and not with the January 1998 jurisdictional determination. Therefore, the complaint did not avoid the statute of limitations bar and is subject to general demurrer. (See *Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 300.)

Baccarat refers to *Lee, supra*, 107 Cal.App.4th at page 857—a case in which property damage incident to construction of a public improvement was continuous and repeated—to bolster its position that when consequential damage is sufficiently appreciable to a reasonable person is a question of fact that cannot be determined on demurrer. In contrast, here there are no allegations of ongoing activities of the public entity with respect to the public improvement. Respondents' conduct long ago created the wetlands. Damages to Baccarat stem from the burden of CWA regulation incident to the Corps' jurisdiction over the wetlands, and the jurisdictional nature of those wetlands has been known to Baccarat since at least January 1998, a date certain that allows the statute of limitations issue to be decided on demurrer.

Second, we reiterate that it is clear from the complaint in this action and the related complaint in the Corps' action that the Corps' exercise of jurisdiction over the wetlands was the crucial event triggering damage to the property in this case. It can reasonably be inferred from these pleadings that wetlands existed on the property at the time of purchase. Almost immediately thereafter, Baccarat conducted a jurisdictional wetlands delineation of the site in August 1997, and *the Corps verified that delineation in*

January 1998. At that point, without question, *the jurisdictional nature of the wetlands*—comprising nearly 25 percent of the site—was established. With that jurisdictional determination, Baccarat commenced the individual permit process to gain approval to fill 2.36 acres of the wetlands in order to develop the site.

Baccarat maintains that the existence of wetlands on “raw” land cannot, as a matter of law, trigger the statute of limitations; that the “mere existence of water” did not preclude the company from developing the property, injure its day-to-day operation, or cause its value to depreciate; and neither did Baccarat’s wetland delineation damage the property—it was simply an inventory. But those, of course, are not the only allegations we have to work with. The trial court was of a mind that the operative accrual date was 1997 because by then Baccarat’s delineation showed the existence of wetlands. While arguments can be made in favor of this reasoning, without question January 1998 is a valid date for reasonable appreciation of constitutional damages *because that is when the Corps asserted jurisdiction over the wetlands*.

Nonetheless, Baccarat continues to assert that the pooling of water on its property did not impede the company’s ability to develop the site until the Corps rendered its 2002 Final Decision, because prior to that time the areas of pooling “would simply have been graded with the rest of the Property in preparation for development.” These assertions are not tenable. “The burden of federal regulation on those who would deposit fill material in locations denominated ‘waters of the United States’ is not trivial.” (*Rapanos v. United States* (2006) 547 U.S. 715, 721 (plur. opn. of Scalia, J.).) The CWA forbids the “discharge of any pollutant” into navigable waters, including wetlands, unless authorized by permit or certain other statutory exceptions. (33 U.S.C. §§ 1311(a), 1344; 33 C.F.R. § 328.3(a) (2008).) “Pollutant” is broadly defined to include solids such as “rock,” “sand,” and “dredged spoil.” (33 U.S.C. § 1362(6).) The federal government may bring an action to prevent a landowner from filling wetlands without a permit, and impose civil and criminal penalties. (*Id.*, § 1319(a)-(d).) Hence, with the Corps’ 1998

jurisdictional determination, Baccarat was obligated to obtain a permit to fill wetlands prior to the development of the commercial project, and faced a heightened probability of a Corps' enforcement action and possible criminal and civil penalties if it did not secure one. (See *Fairbanks North Star v. U.S. Army Corps of Eng.* (9th Cir. 2008) 543 F.3d 586, 596 (*Fairbanks*).) Indeed, we know from the Corps' complaint that on the heels of the Corps' jurisdictional determination, *and pursuant to it*, Baccarat submitted an individual permit application to the Corps for approval to place fill material on a portion of the wetlands.

Baccarat relies on *Fairbanks* for the proposition that it is only the 2002 Final Decision that hindered the company from developing a substantial portion of the site, not the 1998 assertion of jurisdiction or even the May 2001 jurisdictional determination. Apparently, Baccarat believes that a jurisdictional determination and some form of finality are required before damages are sufficiently appreciable to invoke the statute of limitations. Not so. Baccarat confuses the principle of finality in the context of administrative law, with the showing necessary to trigger accrual of the statute of limitations.

Fairbanks involved the dismissal of a complaint for lack of jurisdiction and says nothing about accrual or the statute of limitations. The plaintiff sought judicial review of an approved jurisdictional determination of the Corps but did not apply for a permit, and the Corps did not initiate enforcement activities. In this context the reviewing court held that the jurisdictional determination, by itself, was not a final agency action *under the Administrative Procedure Act* for purposes of judicial review. Although the determination was the consummation of the Corps' decision-making process on the matter, it was not an action from which rights or obligations are determined, or from which legal consequences flow. (*Fairbanks, supra*, 543 F.3d at pp. 589, 591.) The court explained that the municipality's legal obligations arose directly from the CWA, and not

from the Corps' issuance of an approved jurisdictional determination.⁵ (*Id.* at pp. 593-594.)

The accrual question does not turn on the legal consequences of a given decision that has attained administrative finality, but rather on when damage becomes sufficiently appreciable to a reasonable person, in this case, a reasonable developer who purchased property containing wetlands. The practical effect of the Corps' jurisdictional determination required Baccarat to submit to the CWA's permitting regime prior to proceeding with construction. As the *Fairbanks* court acknowledged, "[n]ot every agency 'decision . . . [that] has immediate financial impact,' or even 'profound [economic] consequences' in the real world, is [a] final agency action" (*Fairbanks*, *supra*, 543 F.3d at p. 596.) Further, "navigating the CWA permitting process is no small task. [Citation.] ('The average applicant for an individual permit spends 788 days and \$271,596 in completing the process') . . . [T]hese are the costs of statutory compliance with the CWA." (*Id.* at p. 596, fn. 11.)

3. Regulatory Takings Cases Are Inapposite; This is a Physical Takings Case Turning on the Statute of Limitations

Harkening to regulatory takings cases, Baccarat similarly complains that its inverse condemnation claim was not ripe, and hence could not possibly have accrued, until the 2002 Final Decision. For example, the high court in *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618 held that "a takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' [Citation.]" The final decision requirement enables a court to make

⁵ Referencing *Baccarat Fremont v. U.S. Army Corps*, *supra*, 425 F.3d 1150, the *Fairbanks* court noted that the Corps' action there was final for purposes of the Administrative Procedure Act because Baccarat's review of CWA regulatory jurisdiction was pursued "in context of challenge to discharge permit's mitigation requirements" (*Fairbanks*, *supra*, 543 F.3d at p. 594, fn. 9.)

the constitutional determination as to whether the regulation has deprived the landowner of all economically beneficial use of the property, or defeated his or her reasonable investment-backed expectations to the extent that a taking has occurred. (*Ibid.*)

We point out initially that while Baccarat posits the element of *damages* on the Corps' regulatory and permitting powers, this is not a regulatory takings case, it is an inverse condemnation case based on physical damage to property. The defendants here are the public entities that created the wetlands on Baccarat's property, not the Corps. Baccarat is not constitutionally attacking the 2002 Final Decision in this lawsuit; it is drawing a causal link between the respondents' constitutional invasions of the property and the regulatory impediment flowing from the Corps' exercise of jurisdiction. In the context of damage to property occasioned by physical invasion of it, compensation is required, whereas when the government merely regulates the use of land, compensation is due only if “ ‘considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.’ [Citation.]” (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 9-10.) It is upon this distinction that the prerequisite of a final, authoritative determination rests. Regulatory takings cases ask where a regulation ends and a taking begins, i.e., has a regulation gone too far in restricting use of the property? Courts are loath to answer these questions until the administrative agency has arrived at a final, definitive decision as to how the agency will apply the regulation to the particular property. (*County of Alameda v. Superior Court* (2005) 133 Cal.App.4th 558, 567.) The same concerns are not operative when the taking is effected by physical invasion of the property and just compensation *is required*.

Moreover, we are concerned here with the statute of limitations, which serves a different purpose than the finality doctrine. The purpose of the statute of limitations is to protect the defendants from stale claims brought by dilatory plaintiffs, while motivating

the plaintiffs to assert fresh claims against the defendants in a diligent manner. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395.) A cause of action accrues, and hence the statute of limitations commences, when the cause is complete with all its elements; that is, the statute begins to run upon occurrence of the last element essential to the cause. (*Id.* at p. 397.) And where, as here, accrual depends on discovery of the cause of action, discovery occurs when the plaintiff “has reason at least to suspect a factual basis for its elements.” (*Id.* at p. 398.) As of the Corps’ 1998 jurisdictional determination, and long before its 2002 Final Decision, Baccarat had reason to suspect a factual basis for all elements of its inverse condemnation suit: the public entities’ construction and maintenance activities which caused the wetlands to form, resulting in the Corps’ assertion of regulatory jurisdiction, which in turn restricted development of the property, thereby depreciating its value.

We note with respect to the notion of a dilatory plaintiff, Baccarat appears to think that the plaintiff can control when the statute of limitations begins to run, delaying accrual, for example, simply by the timing of its challenge to the Corps’ jurisdictional determination. Baccarat acquiesced for three years in the Corps’ jurisdictional determination and the accompanying regulatory impediment, having commenced the required CWA permitting process shortly after that determination and then proceeding with the development process. The company did not challenge the Corps’ jurisdictional determination until 2001, not because of any change in the pertinent facts, but because it believed *a change in the law* divested the Corps of jurisdiction. A change in the substantive case law does not revive a claim otherwise barred by the statute of limitations. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 815-817.)

4. *Baccarat’s Pleadings Undermine its Statute of Limitations Argument*

Moreover, Baccarat’s contention that its cause did not accrue until the Corps’ 2002 Final Decision, which confirmed for the third time what the company learned in

August 1997, is belied by its own pleadings, which the law treats as truthful. (*Cantu v. Resolution Trust Corp.*, *supra*, 4 Cal.App.4th at p. 877.) In particular, Baccarat alleged in the Corps' complaint that the Corps' May 8, 2001 jurisdictional determination "effectively prevents BACCARAT from developing a large portion of the Project site." This reassertion of jurisdiction *was not* the 2002 Final Decision. And, because there was no change at all in the facts since the Corps' earlier 1998 jurisdictional determination, the two determinations—May 2001 and January 1998—are identical determinations made on the same facts. In essence, then, the allegation in the Corps' complaint affirms that the 1998 determination likewise restricted development and thereby caused depreciation in the market value of the property.

Additionally, the Corps' complaint—but not the complaint in the instant action—fills in other holes, showing that *it was Baccarat* which asked the Corps to reconsider its January 1998 jurisdictional determination, in light of the *Solid Waste Agency* decision, and that *in response to that request* the Corps reasserted its claim of jurisdiction which "effectively prevent[ed]" development of a "large portion" of the site. As well, the Corps' complaint, unlike the complaint in the instant action, includes the statement that Baccarat submitted an individual permit application to the Corps seeking approval to fill part of the wetlands, which submission was made "pursuant to" the Corps' 1998 jurisdictional determination. This is yet another acknowledgment of the restrictive regulatory effect of that determination on Baccarat's ability to develop the property, namely that the jurisdictional determination required Baccarat to engage in the CWA permitting process in February 1998.

Baccarat cannot escape the allegations in its complaint against the Corps by clinging to its declaration in the instant action that the 2002 Final Decision set the accrual clock ticking. A plaintiff "*may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false.*" (*Cantu v. Resolution Trust Corp.*, *supra*, 4 Cal.App.4th at p. 877.)

5. *Baccarat's Authority is Not Compelling*

Baccarat relies on a number of cases to shore up its legal theory that the 2002 Final Decision marked the point at which a reasonable person would appreciate the damage caused by the wetlands. None is compelling.

Baccarat frequently calls on *Yamagiwa v. City of Half Moon Bay* (N.D. Cal. 2007) 523 F.Supp.2d 1036 (*Yamagiwa*), in which the city's public improvement activity created the wetlands in question and, after a history of arbitrary dealings with the landowners, it made the land use decision to deny the current owner a coastal development permit. The stabilization doctrine governed the accrual issue in *Yamagiwa*: "Where, as here, alleged damage to private property results from a 'continuous process of physical events,' rather than a single event, the law provides that a claim accrues when the taking has 'stabilized.'" (*Id.* at p. 1105.) That doctrine has no bearing on this case. The court went on: "(... '[A]ccrual occurs when Plaintiffs should have reasonably foreseen the extent of the damage to their property.').) [¶] ... [T]he City's denial of the [coastal development permit] was the manifestation of constitutional damages caused by the City's public project. ... [Citation.] Indeed, up until the time the City denied the [coastal development permit] ... , any physical taking case brought by *Yamagiwa* would have been premature, because she had not yet suffered any such damages." (*Ibid.*)

The allegations here are far different from the facts and circumstances in *Yamagiwa*. There, the city had approved a vesting tentative map so as to prevent development on the portion of the site containing wetlands; the Corps had determined there were *no jurisdictional wetlands* within the area of development approved by the vesting tentative map; but the city nonetheless *rejected* the Corps' delineation and proceeded to rely on its own definition of wetlands. It was not until the city switched gears and analyzed wetlands under its own definition—thereby finding new wetlands that had developed *after* the vesting tentative map approval 10 years previously, and concurrently denying the coastal development permit—that the plaintiff first learned that

the wetlands impeded her ability to develop the property. (*Yamagiwa, supra*, 523 F.Supp.2d at pp. 1056-1057, 1063-1064.) On the other hand, here Baccarat has known the extent of the wetlands since shortly after purchasing the property, whereupon the company conducted a delineation survey, the Corps asserted jurisdiction, and Baccarat subjected itself to the burden of the regulatory permitting process.

Nor does *Northwest LA Fish & Game Preserve Com'n v. U.S.* (Fed. Cir. 2006) 446 F.3d 1285 (*Northwest*) support Baccarat's position. This is another case of government taking by a continuing process of physical events, where accrual is postponed until the situation stabilizes and the consequences are " 'so manifested . . . that a final account may be struck.' [Citation.]" (*Id.* at pp. 1290-1291.) In *Northwest*, the commission was tasked with controlling the growth of aquatic vegetation (hydrilla) on Black Lake. The Corps' construction and operation of a system of locks and dams controlled the water level of the lake. The water level of a particular pool created by one such lock and dam directly limited the drawdown capability for the lake to less than what was needed to control hydrilla growth. Although the water level in the pool reached its maximum height in 1994, it was not until 1996 that hydrilla emerged as a problem, prompting the commission to request a draw down, which the Corps definitively refused in 1997. (*Id.* at pp. 1288, 1290-1291.) The reviewing court explained that prior to the Corps' refusal, "there was only the possibility or threat of damage or a taking." (*Id.* at p. 1291.) The gradual process set in motion by the Corps did not stabilize and effect a taking until the Corps' refused to draw down Black Lake to alleviate the harm caused by the overgrowth of hydrilla. Again, the stabilization doctrine does not apply here and development has been restricted since the Corps assumed jurisdiction in 1998, triggering the regulatory process.

Finally, *Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232 is similarly of no avail. The inverse condemnation claim there stemmed from reduction in property value due to the noise of overflight aircraft. The court rejected an accrual date commensurate

with the date of stabilization of the aircraft noise, instead choosing the date the plaintiff discovered the effect of the noise on his ability to sell the property, i.e., when such efforts were frustrated by lender redlining due to the noise. (*Id.* at pp. 238-239.) In *Smart* the inverse condemnation claim was based on an intangible intrusion, not on damage from physical invasion. *Smart* stands for the proposition that the statute accrues in those circumstances upon experiencing the impact of governmental activity; the decision does nothing to aid Baccarat's argument that the intended use of its property was not impaired until the 2002 Final Decision issued.

B. *Negligence*

Baccarat also asserted a negligence cause of action against respondents. The theory is that respondents' purported negligence, which damaged the property, also caused Baccarat to incur legal expenses challenging the Corps' jurisdiction over the wetlands. Specifically, the complaint alleged that respondents breached a duty of care to "to avoid causing ponding or flooding to occur on the Property." But for that ponding and flooding caused by respondents' public improvements, the Corps would not have asserted jurisdiction over the wetlands. "As a natural and probable consequence" of this conduct, Baccarat "was forced" to sue the Corps, and became subjected to the expense of attorney fees and costs as a result.

The one-year statute of limitations governs Baccarat's negligence cause and, because Baccarat is suing a public entity, it is subject to the claims presentation requirements of the California Tort Claims Act. (Gov. Code, §§ 905.2, 911.2, subd. (a).) The date of accrual for the statute of limitations in such an action against a public entity is the same as would otherwise apply in the absence of the claims presentation requirements. (*Id.*, § 901.) A tort action accrues "'upon the occurrence of the last element essential to the cause of action.'" [Citation.] (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1534.) Baccarat contends that litigation expenses incurred in the Corps' lawsuit are an "essential element" of its negligence cause of action

and did not become “finally quantifiable” until the Corps’ lawsuit “ended” in February 2007 when the United States Supreme Court denied certiorari. Thereafter Baccarat presented claims to respondents, the claims were rejected, and on December 11, 2007, Baccarat amended the complaint to add a negligence cause of action. Contrary to Baccarat’s contention, the negligence claim is untimely.⁶

Baccarat relies on the “ ‘tort of another’ ” doctrine, which allows a plaintiff to recover attorney fees as an item of damages if he or she must retain counsel to prosecute or defend an action against a third party because of the defendant’s tort. (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505; *Behniwal v. Mix* (2005) 133 Cal.App.4th 1027, 1043.) Baccarat’s theory of recovery is untenable, stemming from a misunderstanding of this doctrine. The doctrine merely permits the expansion of recoverable consequential damages caused by a defendant’s improper actions to encompass attorney fees, and thus it is but an application of the usual measure of tort damages. (See *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817-818.) “The theory of recovery is that the attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action.” (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310.) Thus the tort of another doctrine has been invoked in situations where there is “a clear violation of a traditional tort duty between the tortfeasor who is required to pay the attorney fees and the person seeking compensation for those fees.” (*Ibid.*)

Here, Baccarat has alleged that respondents were negligent in constructing the public improvements on its property, leading to the creation of wetlands, which in turn occasioned the regulatory oversight of the Corps and ultimately Baccarat’s suit against the agency. The trial court set the accrual date in 1998 when the Corps first exercised its

⁶ Because we conclude the negligence cause is time-barred, we do not address the trial court’s additional ruling that Baccarat did not and could not assert a statutory basis to support this claim.

jurisdiction. Certainly Baccarat suffered appreciable harm then with the exercise of jurisdiction and commencement of the permit process. However, even if we limited our purview of damages appurtenant to the negligence claim to expenses incurred in fighting the Corps' jurisdictional determination, the claim is time-barred. Leaving aside the fact that Baccarat commenced the administrative review and appeal process in January 2001, and undoubtedly incurred expenses, including attorney fees, at that time, Baccarat *admits* it incurred attorney fees in June 2002 when it filed the Corps' lawsuit. Without question Baccarat suffered appreciable harm at that time, but Baccarat nonetheless decided that the fees incurred in 2002 did not become "actionable" until the conclusion of the Corps' lawsuit in 2007. Not so.

Under California law, if an action based on harm immediately caused by a defendant's wrongdoing is disallowed under the statute of limitations, a separate cause of action based on subsequent harm arising from that wrongdoing normally would amount to splitting a cause of action. (*Miller v. Lakeside Village Condominium Assn.* (1991) 1 Cal.App.4th 1611, 1622.) "[A]lthough a right to recover nominal damages will not trigger the running of the period of limitation, the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 514.) Once a plaintiff suffers actual and appreciable harm, neither the speculative nature of damages nor their uncertainty, or the difficulty of proof, will toll the statute. (*Roger E. Smith v. SHN Consulting Engineers & Geologists, Inc.* (2001) 89 Cal.App.4th 638, 651-652.)

Baccarat argues that its accrual of attorney fees is analogous to "an ongoing or continuing wrong or harm," in which case "the statute of limitations does not begin to run until the date of the last injury or when the tortious acts cease." (*Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1452 (*Pugliese*)). Baccarat apparently thinks that *Pugliese* supports the extension of the continuing tort doctrine to the tort of another doctrine, such that as long as a plaintiff sustains "injury" by continuing to wrack up

attorney fees in litigation against defendant A, the statute does not begin to run in tort litigation against defendant B. This is not the case. The continuing tort doctrine applies in cases of a continuing wrong where *the defendant* continues to injure plaintiff, for example, in cases of domestic violence (*Pugliese*) or sexual harassment (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1004). Here respondents' purported tortious conduct ceased years ago; there simply is no continuing wrong and the statute has long lapsed.

III. DISPOSITION

The judgment is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Sepulveda, J.